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IN THE

Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *et al.*,

Petitioners,

—v.—

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTH CAROLINA, AND THE ACLU OF TEXAS, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for over ninety years, and has appeared before this Court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*, including *American Civil Liberties Union of N.C. v. Tata*, 742 F.3d 563 (4th Cir. 2014), *petition for cert. filed sub nom. Berger v. Am. Civil Liberties Union of N.C.*, No. 14-35 (July 11, 2014), which raises issues similar to those presented in this case. The ACLU of North Carolina and the ACLU of Texas are statewide affiliates of the national ACLU.

INTRODUCTION AND STATEMENT OF THE CASE

This case presents the question whether a government body may sell the opportunity to create personalized messages on government property, but restrict that program only to ideas or groups of which the state approves. Here, that question arises in the context of Texas' specialty license plate program, which markets the ability to "personalize" messages that individual drivers display on their vehicle

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[1] The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, its members, or counsel has paid for the preparation or submission of this brief.

plates. Predictably, this forum prompted applications from a variety of groups, from the benign to the controversial. In this case, the Sons of Confederate Veterans (SCV) requested a design bearing the Confederate flag. The State rejected the proposed plate as too offensive to the public.

The Confederate flag has a symbolic significance that many African-Americans and others consider offensive, and for good reason. The Confederate flag was flown by those who defended slavery and sought to dissolve the Union. That ideology was vanquished on the battlefield by the Civil War, but, 150 years later, its legacy has yet to be eliminated "root and branch" from American society. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968).

Texas has many options available to it to address that problem, but censorship is not one of them. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (noting that the appropriate response to speech that offends is "more speech, not enforced silence"). That is precisely what Texas has done, however, by creating a specialty license plate program as a forum for private speech, and then regulating access to that forum by engaging in explicit viewpoint discrimination. By excluding SCV from the state's license plate program, Texas therefore violated the First Amendment, as the Fifth Circuit correctly held.

Texas offers three methods for the creation of a specialty license plate. First, the state legislature may specifically authorize a new plate design.[2] Second, an individual or for-profit organization may generate a design through a state-authorized private vendor called MyPlates.com, subject to approval by the Texas Department of Motor Vehicles Board (DMVB).[3] Finally, and at issue here, the DMVB may issue a new specialty license plate either on its own or after approving an application from any non-profit organization. Tex. Transp. Code Ann. § 504.801(a) (West). In discussing Texas' specialty plate program generally throughout this brief, *amici* make reference only to this third avenue for non-profit specialty plates.

An organization interested in creating a new specialty plate must submit to the Department of Motor Vehicles (DMV) an application that includes a draft design, a marketing plan, and an $8000 deposit

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[2] Legislative plates are codified in Tex. Transp. Code Ann. §§ 504.602–63 (West), and most designs either support a Texan association (*e.g.*, "Texas Young Lawyers Association," *id.* § 504.612; "Daughters of the Republic of Texas," *id.* § 504.637; "Texas Lions Camp," *id.* § 504.656); or an asserted state interest (*e.g.*, "Save Our Beaches," *id.* § 504.6275; "Fight Terrorism," *id.* § 504.647).

[3] *See* 43 Tex. Admin. Code § 217.40. Drivers may log on to MyPlates.com to: a) select from limited releases of seven-letter personalized plates (*e.g.*, "FREEDOM"), b) create their own message of up to six characters or numbers and select one of over 150 background designs, or c) simply choose one of over 150 background designs with a random letter and number combination. The background design options include various color combinations, as well as the emblems of high schools and universities, sports teams, businesses, and charities.

to cover the cost of producing the first 1000 plates. *Id.* at § 504.702(b)(3); 43 Tex. Admin. Code § 217.28(i)(2). Each license plate design is posted on the DMV website for public comment at least 25 days in advance of an open DMVB meeting in which the proposed design will be considered. 43 Tex. Admin. Code § 217.28(i)(5)(C)(6). At this meeting, the Board hears public testimony regarding the plate design before voting to accept or reject the sponsoring non-profit's application. *Id.* §§ 217.28(i)(6)–(7)(A). If a design is accepted, the DMVB still has "final approval authority" and "may adjust or reconfigure the submitted draft design to comply with format or license plate specifications." *Id.* § 217.28(i)(8)(B). State regulations permit the DMVB to reject a specialty plate that does not meet standards specified by the department, such as legibility, reflectivity, and uniqueness, *id.* § 217.28(i)(5), or "if the design might be offensive to any member of the public or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c) (West).

On August 18, 2009, SCV submitted a specialty license plate design to the Texas Department of Transportation (DOT), which administered the specialty plate program at the time. The proposed design included the SCV seal, which consists of the Confederate battle flag surrounded by the words "Sons of Confederate Veterans 1895." There is no dispute that SCV submitted a complete application and that its design met the State's technical standards.

DOT initially approved SCV's specialty plate design. It then held a second vote without any procedural basis for doing so, and denied SCV's

application on December 21, 2009. After administration of the specialty plate program moved to the DMV, SCV submitted a renewed application for its plate design on October 27, 2010. The DMVB approved the design as to its formatting requirements, posted the plate design on its website for public comment, and held a vote at the Board's April 2011 meeting, which resulted in a deadlock of four members in favor of the SCV plate design and four against it. The vote was rescheduled for November 10, 2011. The November 10th meeting was well-attended by members of the public, many of whom voiced opposition to SCV's design, and concluded with a unanimous vote rejecting SCV's application. The Board issued a resolution, which included the following explanation for its denial: "The Board has considered the information and finds it necessary to deny this plate design application, specifically the [C]onfederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, No. A-11-CA-1049-SS, 2013 WL 1562758, at *6 (W.D. Tex. Apr. 12, 2013) [hereinafter *Vandergriff I*] (emphasis and internal citations omitted), *rev'd* 759 F.3d 388 (5th Cir. 2014) [hereinafter *Vandergriff II*].

SCV filed a complaint challenging the DMVB's decision as a violation of its First and Fourteenth Amendment rights. The district court ruled that Texas' specialty plates implicate private speech and comprise a nonpublic forum, but found no viewpoint discrimination. *Vandergriff I*, 2013 WL 1562758 at *19. The Fifth Circuit reversed and remanded,

agreeing that the plates consist of private speech, but deciding that the DMVB did indeed engage in viewpoint discrimination when it denied SCV's specialty plate application. *Vandergriff II*, 759 F.3d 388, 400.

SUMMARY OF THE ARGUMENT

The Confederate battle flag was the banner for those who supported slavery and sought to break our nation apart. It later served as a rallying sign for those seeking to maintain racial separation in all facets of life, from the voting booth to the wedding chapel.

While *amici* agree with the State that the message conveyed by the Confederate flag is offensive to many people, *amici* agree with SCV that Texas' specialty license plate program is a forum for private speech, and that the DMVB is therefore prohibited from denying access to that forum on the basis of viewpoint.

These license plate disputes have been litigated extensively in the lower courts. Only the Sixth Circuit has agreed with Texas that specialty license plates represent a form of pure government speech that is outside the scope of the First Amendment entirely. Every other Circuit to consider the question has properly concluded that specialty license plate programs include an important element of private speech that triggers, at a minimum, the First Amendment's protection against viewpoint discrimination.

In reaching this conclusion, some lower courts have adopted a four-factor test that considers the central purpose of the program at issue, the identity

of the literal speaker, the entity that retains editorial control over the speech, and the entity that bears ultimate responsibility for the speech. Those factors applied to this case amply support the decision below holding that Texas has created a forum for private speech through its specialty license plate program.

Once the government opens a forum for private speech, as it has done here, it is undisputed that two rules always apply: 1) the State may not engage in viewpoint discrimination, and 2) the State may not establish vague and indefinite standards that permit state officials to regulate speech with unfettered discretion. Texas has violated both rules. First, it undeniably engaged in viewpoint discrimination by denying SCV's request for a specialty license plate on the grounds of offensiveness. Second, a standard that permits the State to deny a specialty license plate if "the design might be offensive to any member of the public" is no standard at all, and invites the kind of viewpoint discrimination that occurred in this case.

Finally, nothing in the decision below prevents Texas from adopting viewpoint-neutral rules to disassociate itself from the message conveyed by the SCV specialty license plate.

ARGUMENT

I. TEXAS' SPECIALTY LICENSE PLATE PROGRAM IMPLICATES PRIVATE SPEECH RIGHTS.

A. Specialty License Plates Contain Hybrid Speech.

Whether Texas' specialty license plates comprise government or private speech lies at the heart of this case, because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). In other words, Respondents have a First Amendment claim only if the messages on specialty license plates express the views of private individuals.

Specialty license plates present a situation unlike other First Amendment issues previously before the Court: one in which private speech and government speech are entwined. Most circuit courts to have considered this issue have concluded that specialty license plates involve a mixture of private and government speech. *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (noting that "both the state and the sponsoring organization exercise some degree of editorial control over the messages on specialty plates"); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (specialty license plates implicate both government and private speech); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008) (same); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) (stating that "Choose Life" license plate "appears to be neither

purely government speech nor purely private speech, but a mixture of the two").

Some lower courts have characterized the content of specialty license plates to be "hybrid speech,"[4] a theory the Court has yet to consider.[5] Characterizing Texas' specialty license plate program as a hybrid scenario reflects its complexity more accurately than labeling it as encompassing purely governmental or purely private speech. Indeed, the

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[4] *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 244–45 (4th Cir. 2002) (suggesting that it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government, and that a speech event cannot be *both* private and governmental at the same time. . When the Supreme Court is finally confronted with the case in which this elaboration upon its 'government speech' doctrine is compelled, I am convinced that our court in turn will, upon reflection, conclude that at least the particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.") (Luttig, J., *respecting the denial of rh'g en banc*).

[5] *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 618, 618 (4th Cir. 2002) [hereinafter *SCV I*] (noting that "there exists some controversy over the scope of the government speech doctrine"); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001) ("The Supreme Court has provided very little guidance as to what constitutes government speech."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1 377, 1509 (2001) (recognizing "theoretical confusion" in the government speech doctrine).

problem with having only two polar choices is illustrated by the Fifth Circuit's decision in this case.

In the opinion below, *both* the majority and the dissent based their conclusions on the Court's reasoning in *Summum*, 555 U.S. 460 (finding government speech in selection of donated monuments for a public park), and *Johanns*, 544 U.S. 550 (deciding advertisement funded by assessment on beef producers was not susceptible to a First Amendment compelled-subsidy challenge).[6] But neither *Summum* nor *Johanns* involved hybrid speech, and the Court's holdings were explicit on that point.[7] As the Court anticipated in *Summum*, it is now faced with a situation in which it is "difficult to

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[6] Petitioner's contention that the correct standard is whether the State maintains "effective control" of the speech is constitutionally untenable and would lead to absurd results if used as a stand-alone test. It would allow the government to free itself from the restrictions of the First Amendment simply by giving itself the authority to approve or disprove of particular speech. With this circular standard, the State would have the power to rubber stamp its own discriminatory practices.

[7] Both decisions specifically disclaimed any application to hybrid speech scenarios. In *Summum*, the Court noted that "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech." 555 U.S. at 470. Likewise, in *Johanns*, the Court explicitly noted that it was not addressing a hybrid speech issue: "The message set out in the beef promotions is from beginning to end the message established by the Federal Government." 544 U.S. at 560.

tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." 555 U.S. at 470. The Court should take this opportunity to provide guidance to the lower courts on how best to analyze the constitutional questions presented when a state invites private individuals to express private messages on government property.

The circuits have adopted a variety of tests to distinguish between government and private interests in hybrid speech situations. Though the tests vary, their application to the context of specialty license plates has overwhelmingly resulted in the conclusion that such plates contain private speech protected by the First Amendment.[8] Some

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[8] *See Vandergriff II*, 759 F.3d at 395–96; *Tata*, 742 F.3d at 575; *Roach*, 560 F.3d at 868; *Choose Life Ill.*, 547 F.3d at 855; *Stanton*, 515 F.3d at 968. Though not reaching the merits, the Eleventh Circuit also "fail[ed] to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech." *Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003). Also, the Second Circuit analyzed the recall of a "SHTHPNS" vanity plate as a restriction "concerning private individuals' speech." *Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001). In short, the State's assertion that specialty license plates constitute government speech has been rejected by seven circuits.

The Sixth Circuit stands alone in holding that specialty license plates constitute government speech unprotected by the First Amendment. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379–80 (6th Cir. 2006). Every appellate court to consider whether First Amendment protections apply to specialty license plates since *Bredesen* has disagreed with the Sixth Circuit's logic—often explicitly. *See Vandergriff II*, 759 F.3d at 396 (declining "to follow *Bredesen* because the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent");

circuits have adopted Justice Souter's "reasonable observer" test: "whether a reasonable and fully informed observer would understand the expression to be government speech." *Summum*, 555 U.S. at 487 (Souter, J., concurring). Other courts apply a four-factor test. To determine whether speech belongs to the government, private parties, or both, the four-factor test looks to:

> 1) the central "purpose" of the program in which the speech in question occurs;
>
> 2) the degree of "editorial control" exercised by the government or private entities over the content of the speech;
>
> 3) the identity of the "literal speaker"; and
>
> 4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

SCV I, 288 F.3d at 618. Because the four-factor test focuses on the nature and history of the challenged program, which the reasonable observer is presumed to know, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.

Roach, 560 F.3d at 867 (rejecting Sixth Circuit approach in favor of that adopted by the Fourth, Seventh, and Ninth Circuits); *Choose Life Illinois*, 547 F.3d at 863 (same); *Stanton*, 515 F.8d at 963–64 (agreeing with Judge Martin's dissent in *Bredesen*).

290, 308 (2000), it is hardly surprising that both tests have led to the same result in this context.[9]

The four-factor test has been applied in varied factual circumstances, and permits the courts to assess the complex ways in which individuals and government commingle their speech. Application of the four-factor test in the context of specialty license plates has consistently and correctly found that private speech elements predominate.[10] *See Tata*, 742 F.3d 563 (using four-factor test to analyze North Carolina's specialty plate program, resulting in a private speech determination); *Rose*, 361 F.3d 786 (concluding that as applied to South Carolina's specialty plate program, the "four-factor test

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[9] In *Bredesen*, the Sixth Circuit did not apply either the reasonable observer test or the four-factor test, but instead reasoned that "[s]o long as Tennessee sets the overall message and approves [a specialty license plate's] details, the message must be attributed to Tennessee for First Amendment purposes." 441 F.3d at 377.

[10] In other contexts, the four-factor test has produced different results. *See Wells*, 257 F.3d 1132 (analyzing corporate sponsorship sign of city holiday display according to four factors and deciding that sign comprised government speech); *Downs v. L. A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (applying similar reasoning in deciding school's bulletin boards are government speech); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (using four-factor test to decide that announcements of sponsors' names on public radio station constituted government speech). *But see Cimarron Alliance Found. v. City of Oklahoma City, Okla.* 290 F. Supp. 2d 1252 (W.D. Okla. 2002) (using four factors to determine that city's program for displaying banners on utility poles did not constitute government speech).

indicates that both the State and the individual vehicle owner are speaking"); *Stanton*, 515 F.3d 956 (applying four-factor test to decide Arizona's "special organization license plate program" was predominantly private speech and thus regulation had to be viewpoint-neutral).

B. The Four-Factor Test Leads to a Result Consistent with Overwhelming Circuit Court Precedent and Reflects the Nuances of Hybrid Speech.

As noted above, the four-factor test assesses: 1) the purpose of the program where the speech occurs, 2) the division of editorial control, 3) the identity of the literal speaker, and 4) who bears ultimate responsibility for the content of the speech. As applied to Texas' specialty license plates, each of the four factors weighs in favor of a finding of predominately private speech.

1. The central purpose of the specialty license plate program is to encourage Texas drivers to pay an additional fee in exchange for the right to express a message that they have chosen, not to disseminate a message that the State has crafted.[11] As the district court determined—and the State concedes—Texas offers personalized license plates to raise revenue.[12] The means for the State to raise this

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[11] In that regard, it is surely revealing that Texas offers license plates supporting out-of-state universities and sports teams, including such archrivals as the University of Oklahoma.

[12] For each specialty plate, the DMV keeps $8 to cover administrative costs. It then issues the remaining $22 to the

revenue is to allow private citizens to choose a license plate design to their liking, thereby expressing a particularized message everywhere they drive. This incentive scheme is clearly demonstrated on the State's DMV website, which states, "Specialty license plates give your vehicle a *personal* touch."[13] *See also Stanton*, 515 F.3d at 967 (stating "the revenue raising purpose of the Arizona special organization plate program supports a finding of private speech"); *SCV I*, 288 F.3d at 619–20 (deciding that primary purpose of Virginia's specialty plate program is to collect revenue, indicating private speech).

2. The record indicates that the State maintains only limited "editorial control" over specialty license plates. Instead, the idea for the plate and the design itself both originate with the non-profit organization that seeks to promote its message. There is no provision for the DMVB, or any other state agency, to engage with an applicant to edit or contribute to the substance of its license plate design. As the district court noted, the DMVB's input is "limited to (1) technical reformatting of a design to enable it meet [sic] visibility, distinctiveness, and reflectivity requirements, and (2) rejecting applications which otherwise do not conform to the various statutory and rule requirements for a

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sponsoring state agency, if any, which passes a portion to the non-profit organization. Tex. Transp. Code Ann. § 504.801(e) (West). If no sponsor was named, the remainder goes to the state highway fund. *Id.*; *see also Vandergriff I*, 2013 WL 1562758 at *17 n.15.

[13] Texas Dep't of Motor Vehicles, http://txdmv.gov/motorists/license-plates (last visited Feb. 12, 2015) (emphasis added).

specialty plate." *See Vandergriff I* at *2; *see also* 43 Tex. Admin. Code § 217.28(i)(8). Thus, the editorial control prong leads to a conclusion that the speech on specialty license plates should be attributed to the private parties who design them. *See Stanton*, 515 F.3d at 966; *Wells*, 257 F.3d at 1142.

3. The third factor, which looks to identify the speaker of the hybrid speech, also leads to the conclusion that the specialty plate message is expressed by a private party—the driver who decides to purchase and display the plate on her private vehicle. This result is consistent with the holding in *Wooley v. Maynard*, in which the Court held that New Hampshire residents have the right to cover the state motto, "Live Free or Die," on standard-issue license plates. 430 U.S. 705, 717 (1977). In overturning Mr. Maynard's convictions for violating a statute that made it a misdemeanor to obscure the state motto, the Court held the statute unconstitutional because it "in effect require[d] that appellees use their private property as a 'mobile billboard' for the State's ideological message." *Id.* at 715. In this case, the fact that the State owns and manufactures specialty license plates certainly gives rise to some government speech interest. But the decision to select, purchase, and display a particular message is made solely by the car owner. Because *Wooley* deems even a standard-issue license plate to implicate private speech interests when displayed on a personal vehicle, the literal speaker of the message on a specialty license plate is surely the private party who has chosen to convey that speech. *See Perry*, 280 F.3d at 166 (stating that a restriction on vanity plates "concern[ed] private individuals' speech on government-owned property"); *Rose*, 361 F.3d at 793–

94 ("The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State, just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker.").

4. Finally, the question of who bears the "ultimate responsibility" for the content of the specialty license plates is closely related to whether the government or a private party is the literal speaker. *See Rose*, 361 F.3d at 793–94; *Stanton*, 515 F.3d at 967. In *Wells*, the court found the government's ownership of a means of communication to be an important indicator of government speech. 257 F.3d at 1143. However, in light of the Court's holding in *Wooley*, courts have determined government ownership of specialty license plates to be less indicative of ultimate responsibility than the actions of private individuals who create and support their messages. *See SCV I*, 288 F.3d at 621 ("[T]he parties do not dispute here that Virginia continues to own the special plates at all times. Importantly, though, the special plates are mounted on vehicles owned by private persons, and the Supreme Court has indicated that license plates, even when owned by the government, implicate private speech interests ").

In Texas, a non-profit organization determines the design, submits the application, and carries the burden of funding the first 1000 license plates. After production, an individual driver selects the specialty plate from a range of options, pays a premium to obtain, renew, and secure the plate, and displays it on her vehicle. As such, private parties are ultimately responsible for the speech. *See Rose*, 361

F.3d at 794 ("Although the Choose Life plate was made available through state initiative, the private individual chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle.").

* * *

The four-factor analysis balances the competing interests in specialty license plate programs, which include elements of private and governmental speech to varying degrees. Texas' program, however, firmly tilts this balance to one side, compelling the conclusion that private speech interests—and the First Amendment—are at issue.[14]

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[14] The reasonable observer test produces the same conclusion. First, a reasonable observer with knowledge of the program would understand the four factors discussed above and appreciate their significance. *See supra* section I.B. Second, and more simply, the reasonable observer would understand that most cars do not have any specialty license plate, and those that do carry a range of messages selected by their owners, undermining the claim that the State is trying to deliver its own consistent message.

II. TEXAS OPENED A FORUM FOR PRIVATE SPEECH THAT MAY NOT BE REGULATED ON THE BASIS OF VIEWPOINT.

A. By Offering a Means for Organizations to Promote Personalized Messages, Texas Created a Forum for Private Speech.

The scope of the First Amendment's protection for speech turns on the nature of the forum in which it is expressed. The Court has identified three types of fora deserving of First Amendment protection: the traditional public forum, the designated public forum, and the nonpublic forum. *See Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45–7 (1983). But no matter what type of forum the State has created, one thing is clear: The government may not pick and choose private speech on the basis of viewpoint.

To be sure, government property does not become a forum for private expression "simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Nor will the Court "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 803 (1985). Finally, the Court may decline to engage in forum analysis when the property at issue is not "capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Summum*, 555 U.S. at 478.

None of those concerns is present here. The State's offer of specialty plates for profit contrasts sharply with the limited space in a public park that led to the Court's rejection of a forum analysis in *Summum*; nothing in the record suggests any limit on the number of plates that may be produced so long as a private organization bears the cost. Nor is it credible to assert that personalized message-bearing license plates could be inconsistent with expressive activity—to the contrary, the specialty plate program's profitability turns on the opportunity for individualized expression.

Furthermore, this case does not present the risk of holding individuals on government property as "a captive audience," a concern that led the Court to hold that advertising space inside public buses is not a protected forum:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Lehman v. City of Shaker Heights, 418 U.S. 298, 303–4 (1974). In this case, the spaces for specialization on license plates are essentially mobile mini-fora that neither give rise to a danger of state favoritism nor implicate any proprietary concern.

In sum, the district court properly concluded that by offering non-profit organizations the opportunity to design license plates to promote their causes, Texas created a forum for private speech.[15] This result is consistent with, if not dictated by, the conclusion that the speech at issue on these plates is predominately private.[16]

B. The First Amendment Prohibits Viewpoint Discrimination in a Government-Created Forum, No Matter How Repugnant the Viewpoint.

The Court has ruled that the First Amendment prohibits viewpoint-based discrimination of private speech. The State "must abstain from regulating speech when the specific

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[15] The district court identified Texas' specialty license plate program as a "nonpublic" forum, *Vandergriff I*, 2013 WL 1562758 at *10. The Court has sometimes referred to a limited public forum where government property has been made available to some speakers or for certain subjects without being open to indiscriminate use for private expression. *See e.g. Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Any difference between a nonpublic forum and a limited public forum is immaterial in this context, however, because viewpoint discrimination is prohibited in both. *See id.* at 829–30; *Cornelius*, 473 U.S. at 811–12.

[16] Of course, *unconstitutional* limitations on speech cannot support the government's arguments that it has not opened a forum for private speech. *See Cornelius*, 473 U.S. at 802–03 ("The policy evidenced a clear intent to create a public forum, notwithstanding the University's erroneous conclusion that the Establishment Clause required the exclusion of groups meeting for religious purposes.") (discussing *Widmar v. Vincent*, 454 U.S. 263 (1981)).

motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. Even in a nonpublic forum, the government may only create restrictions on speech that are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. Yet the Texas law authorizing its specialty plates contains a provision explicitly permitting viewpoint discrimination: The DMVB "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." Tex. Transp. Code Ann. § 504.801(c) (West).

The State's discomfort with the Confederate battle flag, historically a symbol of white supremacy, is both eminently understandable and an unconstitutional basis for rejecting SCV's message. *See Johnson*, 491 U.S. (striking down flag desecration statute on First Amendment grounds).

A specialty license plate bearing the Confederate flag undoubtedly evokes strong emotions in the public, particularly considering the State's own troubled history. Over 30,000 Texans reportedly contacted the DMVB regarding SCV's plate in order to ask the Board to reject the "racist relic."[17] In advance of the DMVB's meeting to vote on SCV's proposed design, several Texas officials sent letters urging the Board to vote against it, including nineteen state representatives and the mayor of

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[17] Mark Corcoran & Phillip Martin, *We Won: Confederate Flag Rejected*, Progress Texas, Nov. 11, 2011, http://progresstexas.org/blog/we-won-confederate-plate-rejected.

Houston. *Vandergriff I*, 2013 WL 1562758 at *6. Several state officials testified, including State Senator Royce West, who said, "Why should we, as Texans, want to be reminded of a state-sanctioned system of segregation and repression?"[18] Even Governor Rick Perry, who fought against the removal of bronze plaques with symbols of the Confederacy from the state supreme court, spoke against the license plate design, stating, "We don't need to be scraping old wounds."[19] Faced with this passionate response, the DMVB voted unanimously to reject SCV's application.

Understandable as the DMVB's decision may have been, there is no question that the animosity towards SCV's message constitutes viewpoint discrimination. The DMVB's stated reason for denying the plate design, pursuant to Tex. Transp. Code Ann. § 504.801(c) (West), was that "many members of the general public find the design offensive." *Vandergriff I*, 2013 WL 1562758, at *6.

Like the Fifth Circuit, every court of final appeal to grapple with a state's rejection of SCV's design has found impermissible viewpoint

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[18] Mike Ward, *Vehicle Board Rejects Proposal for Confederate Flag License Plate*, Austin Am. Statesman, Nov. 10, 2011, http://www.statesman.com/news/news/state-regional-govt-politics/vehicle-board-rejects-proposal-for-confederate-fla/nRg66/.

[19] Sommer Ingram, *Perry Doesn't Want Confederate Flag License Plates*, Dallas Morning News, Oct. 26, 2011, http://www.dallasnews.com/news/politics/perry-watch/headlines/20111026-perry-doesnt-want-confederate-flag-license-plates.ece.

discrimination. *See Vandergriff II*, 759 F.3d at 397–98 ("We agree with Texas SCV and hold that the Board engaged in impermissible viewpoint discrimination and violated Texas SCV's rights under the First Amendment."); *Sons of Confederate Veterans, Inc. v. Atwater*, 2011 WL 1233091, at *1 (M.D. Florida 2011) (holding discrimination against Confederate flag design viewpoint-based); *SCV I*, 288 F.3d at 626 (same); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F Supp. 1099, 1105 (D. Maryland, 1997) (same).

However reasonable this distaste for a symbol of racism, the Constitution does not permit the State to discriminate against messages in a forum it has created for private speech.

C. Texas Has Other Options to Advance its Stated Interests Without Engaging in Viewpoint Discrimination.

The State is not without recourse in addressing concerns about offering a platform for a message it understandably opposes, so long as those means are viewpoint-neutral. In *Cornelius*, the Court recognized:

> Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic

> forum and hinder its effectiveness for its intended purpose.

473 U.S. at 811; *see also Perry Educ. Ass'n*, 460 U.S. at 49 (stating that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."). Accordingly, the First Amendment permits the State at least the following options for regulating private speech in a limited or nonpublic forum: 1) establish content-neutral rules; 2) use its own government soapbox to express disapproval of certain designs; 3) shut down the specialty license plate program; or 4) establish reasonable and non-pretextual content-based rules.

First, the State may add to its existing content-neutral rules for license plate speech.[20] If the

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[20] The current rules allow the DMVB to consider the following factors when reviewing an application for a new specialty plate:

> (B) the proposed license plate design, including:
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> (i) whether the design appears to meet the legibility and reflectivity standards established by the department;
>
> (ii) whether the design meets the standards established by the department for uniqueness;
>
> ...
>
> (v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and
>
> (C) the applicant's ability to comply with Transportation Code[] § 504.702 relating to the required deposit or application that must

State is concerned about the perception that it supports messages on specialty plates, the State may mandate a design that more clearly delineates the private speech included on any plate. These may include font type, size, or color requirements; a consistent border surrounding all specialty designs; or even an explicit disclaimer such as "The State of Texas Does Not Endorse This Message." By using such tools, the State can make plain that "the message is one of neutrality rather than endorsement." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 248 (1990).

In addition, the State can express its opposition to racism, SCV, or the Confederate flag through state websites, legislative decrees, or publicity campaigns—including those funded through revenue from its specialty plate program. *See Widmar*, 454 U.S. at 274 n.14 (noting that inference of University support for religious groups using a school meeting place was unlikely where student handbook stated that University does not identify with aims of any organization or its members).[21]

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be provided before the manufacture of a new specialty license plate.

43 Tex. Admin. Code § 217.28(i)(5)(B)–(C).

[21] *See also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("To the plurality's consideration of the open nature of the forum and the private ownership of the display, however, I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State's role clear to the community. This factor is important because,

Texas could also shut down its specialty license plate program. Or, should the Court agree with the district court that the specialty license plate program creates a nonpublic forum, the State has leeway to create reasonable, content-based regulations so long as they are not a pretext for viewpoint discrimination.[22] *See e.g., Cornelius*, 473 U.S. at 809 (excluding "legal defense and political advocacy organizations" from charity drive was facially constitutional). The Court has been vigilant in ensuring that rules restricting content do not become a smokescreen for prohibiting controversial viewpoints. *See id.* at 811 (stating, "The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (2001) (deciding school

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as Justice Souter makes clear, certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message—particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings. In context, a disclaimer helps remove doubt about state approval of respondents' religious message.") (internal citations removed).

[22] Notably, however, the State may not now create a content-based regulation of its license plate program that is actually intended to limit the *viewpoint* of SCV, or any other party. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 736 (1982) ("The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination.").

policy prohibiting use of facilities "for religious purposes" was viewpoint discrimination).

III. THE FIRST AMENDMENT DOES NOT PERMIT STANDARDLESS DISCRETION IN REGULATING SPEECH.

Texas' specialty license plate program also facially violates the First Amendment because it grants state officials unbridled discretion in determining which plates to permit or reject. This constitutional infirmity results from Texas' regulatory language permitting the DMVB to reject any plate "if the design *might* be offensive to *any* member of the public." Tex. Transp. Code. Ann. § 504.801(c) (West) (emphasis added). This lax standard allows officials to both use a vague "offensiveness" standard to reject a plate and to improperly guess the degree to which a member of the public might wish to veto the speech. The First Amendment does not permit such a limitless metric for regulating private speech.[23]

The Court has consistently required licensing statutes regulating speech to include clear guidelines to ensure that officials do not grant or deny permits in an *ad hoc* fashion. In *City of Lakewood v. Plain Dealer Publ'g Co.*, the Court stated:

> At the root of this long line of precedent is the time-tested knowledge that in the

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[23] Even in cases in which the speech at issue is predominantly governmental and there is no public forum, as in *Lehman*, speech may not be regulated in an "arbitrary, capricious, or invidious" manner. 418 U.S. at 303.

> area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.

486 U.S. 750, 757 (1988). The prohibition on unchecked discretion applies fully in any forum, because it leads to viewpoint discrimination. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (remanding question of access to nonpublic forum because it was "unclear what protection, if any, there is for viewpoint neutrality"); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304–05 (holding that nonpublic forum of student election system provided "insufficient safeguards [for] diverse student speech"). As the Court has noted, "the absence of express standards makes it difficult to distinguish, as applied, between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." *City of Lakewood*, 486 U.S. at 758.[24]

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[24] Additionally, the Court has examined statutes that vest unbridled discretion to regulate speech under the Due Process Clause as a vagueness or overbreadth issue. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'") (quoting *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)). The Constitution requires the State to define restrictions on speech with clarity to both ensure fairness and avoid viewpoint discrimination.

Furthermore, the Court has held that regulations that are dependent upon the public's reaction to the speech violate the First Amendment. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870–71 (1997) (holding that the Communications Decency Act's prohibitions on "indecent" and "offensive" speech provoke uncertainty and undermine the statute's stated goal of protecting minors); *Forsyth Cnty., Ga., v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (finding permitting fee ordinance tied to listeners' reaction to speech facially invalid in part because "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees"); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 154–155 (1969) (determining city commission's authority to regulate assembly based on "public welfare, peace, safety, health, decency, good order, morals or convenience" allowed it to "unwarrantedly abridge the right of assembly") (internal quotations removed). The Court should not allow the Texas DMVB to continue discriminating against the views of its license plate applicants pursuant to an unconstitutionally vague standard.

CONCLUSION

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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